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**IN THE
COURT OF APPEALS OF INDIANA**

CLARENCE R. CROWTHER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee.

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No. 84A01-0609-CR-374

APPEAL FROM THE VIGO SUPERIOR COURT 1
The Honorable Michael H. Eldred, Judge
Cause No. 84D01-0406-FB-1610

May 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

After Appellant, Clarence Crowther, pleaded guilty to Sexual Misconduct with a Minor as a Class B felony, the trial court sentenced him to six years, with four years executed and two years suspended. Upon appeal, Crowther argues that the trial court considered improper factors in support of its sentencing decision.

We affirm.

On June 16, 2004, the State charged Crowther with two counts of sexual misconduct with a minor, one as a Class B felony and one as a Class C felony.¹ On May 25, 2006, Crowther pleaded guilty to one count of sexual misconduct with a minor as a Class B felony. According to the factual basis submitted at the guilty plea hearing, on or about January 1, 2004 through and including June 1, 2004, Crowther engaged in deviate sexual conduct with J.T.P., who at the time was fourteen years of age. In exchange for his plea of guilty, the State agreed to dismiss the second charge of sexual misconduct with a minor and further set forth in the plea agreement that sentencing was left to the trial court's discretion so long as the executed portion of the sentence would not exceed four years. At the conclusion of the sentencing hearing held on August 7, 2006, the trial court stated as follows:

“All child molestations are bad, but there are varieties of them which people don't recognize, touching on just over the clothes on one end, sexual intercourse on the other end is the most severe. I really have sympathy for your family, Mr. Crowther, but unfortunately these acts really fall on the severe side, and that cannot be helped.” Transcript at 30-31.

¹ See Ind. Code § 35-42-4-9 (Burns Code Ed. Repl. 2004).

The trial court then sentenced Crowther to the minimum sentence of six years² with two years suspended, thus leaving a four-year executed sentence consistent with the plea agreement.

Upon appeal, Crowther argues that the trial court considered improper factors in sentencing him to the minimum of six years with two years suspended and four years executed.³ During the sentencing hearing, Crowther had urged the trial court to “impose a six year sentence and suspend all of it but for maybe some time at the work release program.” Transcript at 26.

Sentencing decisions are within the sound discretion of the trial court. Patterson v. State, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). Subject to certain limitations, Indiana Code § 35-50-2-2 (Burns Code Ed. Supp. 2006), the trial court’s authority to fix a sentence within statutorily prescribed parameters includes the statutory discretion to suspend a sentence and to order probation and establish its terms. Taylor v. State, 820 N.E.2d 756, 759-60 (Ind. Ct. App. 2005), trans. denied.

² In response to Blakely v. Washington, 542 U.S. 296 (2004), the legislature amended Indiana’s statutory sentencing scheme, effective April 25, 2005, to provide for an advisory sentence rather than a presumptive sentence. Since Crowther committed the instant offense between January and June 2004, before the effective date of the amendment, we apply the version of the statute then in effect. In any event, the minimum sentence for a Class B felony was unchanged. Compare Ind. Code § 35-50-2-5 (Burns Code Ed. Supp. 2006) (“A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.”) (effective April 25, 2005) with Ind. Code § 35-50-2-5 (Burns Code Ed. Repl. 2004) (“A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances.”).

³ To the extent Crowther invokes the rule announced in Blakely, his argument is wholly misplaced. The Blakely rule requires that before a sentence may be enhanced for aggravating circumstances, a jury must find those aggravating circumstances beyond a reasonable doubt or the defendant must admit to such aggravating circumstances. Here, Crowther’s sentence was not enhanced based upon aggravating circumstances. In fact, Crowther received the minimum sentence for a Class B felony. Blakely is inapplicable to the present case.

Crowther's primary complaint upon appeal is that the trial court and the victim's mother made reference to the offense as a "child molestation." Transcript at 30, 6. Crowther asserts that this was improper because he pleaded guilty to sexual misconduct with a minor, not the offense of child molesting. Crowther also argues that the deputy prosecutor's reference to the victim as thirteen years old was improper, when in fact Crowther admitted to engaging in sexual deviate conduct with a fourteen-year-old.

Although technically the trial court misspoke when it referenced the offense as a child molestation, this does not undermine our confidence in the court's sentencing decision. Such reference seems to be an attempt by the court to describe the offense in lay terminology. The trial court was not focusing upon the age of the victim but rather upon the fact that Crowther engaged in deviate sexual conduct with a child, an act which many would characterize as a "child molestation" without regard to the fact that our legislature has technically defined the offense as "sexual misconduct with a minor" because the victim was fourteen years of age.⁴ In short, we do not take the trial court's reference to the offense as a "child molestation" as a misunderstanding on the trial court's part as to the offense for which Crowther was being sentenced.

⁴ We recognize that the key difference between the offenses of child molesting and sexual misconduct with a minor, at least as pertinent to this appeal, is the age of the victim. Compare I.C. § 35-42-4-9 with Ind. Code § 35-42-4-3 (Burns Code Ed. Rep. 2004). If the child is under fourteen years of age, the offense is classified as child molesting; if the child is at least fourteen years of age but less than sixteen years of age, the offense is classified as sexual misconduct with a minor. In the present case, if the victim had been thirteen years of age, the State could have charged Crowther with child molesting as a Class A felony. Instead, the State alleged the victim was fourteen years of age and thus charged Crowther with sexual misconduct with a minor as a Class B felony. The victim's age was thus the difference between Crowther being charged with B felony sexual misconduct with a minor instead of A felony child molesting.

With regard to Crowther's claimed error concerning the victim's age, we note that there is a suggestion in the record that the victim was thirteen years of age for part of the period during which the conduct was alleged to have occurred, but that at some point, she turned fourteen years of age. In any event, the charging information set forth the offense as sexual misconduct with a minor and alleged that the victim was fourteen years of age, and Crowther pleaded guilty thereto. Moreover, Crowther's counsel pointed out to the trial court that as pertinent to the sentence to be imposed, the victim was fourteen years of age. After reviewing the record, we conclude that the deputy prosecutor's reference to the victim as thirteen years old likely had little, if any, impact upon the trial court's decision as to what sentence to impose. As noted above, it was the conduct, not the age of the victim, which was the court's primary concern.

Crowther also argues that the deputy prosecutor improperly argued that there were multiple acts of deviate sexual conduct and that the trial court inappropriately considered that there were multiple acts when there was no evidence presented to the court regarding multiple acts, and Crowther pleaded guilty to only one act of sexual misconduct with a minor occurring on one occasion. Even in light of references to multiple acts, from a review of the record, it is clear that the trial court understood that it was sentencing Crowther for one count of sexual misconduct with a minor. The trial court's decision to order four years of the six-year sentence to be executed was clearly based upon Crowther's conduct, in and of itself, not, as noted above, the age of the victim or the number of times the conduct may have occurred. Crowther's claim of error in this regard

does not lead us to conclude that the trial court abused its discretion in deciding what sentence to impose.

To the extent that Crowther argues that his sentence is inappropriate, we observe that Crowther requested imposition of the minimum sentence of six years. He cannot therefore complain that this sentence is inappropriate. In this regard, however, it appears that Crowther's real complaint is that the trial court abused its discretion insofar as the trial court ordered that four years of the six-year sentence be executed.⁵ Pursuant to the terms of his plea agreement, the trial court had the authority to order up to four years of the imposed sentence to be executed. Although Crowther could argue, and in fact did argue, that the entire sentence should be suspended, he had no right to receive an entirely suspended sentence. See Taylor, 820 N.E.2d at 759-60. Indeed, upon appeal, Crowther has failed to provide any reasons as to why the trial court should have suspended his entire sentence. As noted above, the trial court is vested with statutory discretion to suspend all or part of a sentence. Here, the trial court imposed the minimum sentence, suspended two years and ordered four years to be executed. Based upon the record, we cannot say that the trial court abused its discretion.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.

⁵ Although Crowther characterizes his sentence as "inappropriate" and requests that this court impose an "appropriate" sentence, he does not assert any cognizable arguments relating to the nature of the offense or the character of the offender. Appellant's Brief at 6. Instead, Crowther's argument essentially challenges the trial court's discretion insofar as the trial court determined how much of the sentence would be executed.